Decision No. 374

O (No. 2),
Applicant

v.

International Bank for Reconstruction
and Development,
Respondent

1. This judgment is rendered by a Panel of the Tribunal established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, and Judges Sarah Christie and Florentino P. Feliciano. The application was received on 22 March 2007. The Bank has raised jurisdictional objections which are the sole matters decided by this judgment.

Factual Background

2. The Applicant worked in the Bank's Legal Vice-Presidency from 22 December 1986 until her employment was terminated on 31 July 2007 pursuant to a memorandum of understanding (MOU). The Applicant alleges that the Bank breached that MOU, and that in any event it was invalid by reason of the Bank's lack of good faith when concluding it. The context of the MOU was, in summary, as follows.

3. On 8 April 2004, the Applicant filed her first application with the Tribunal, challenging as retaliatory (i) the extension in November 2001 of a performance improvement plan (PIP) initiated in November 2000, and (ii) a memorandum dated 16 January 2002, concluding the PIP assessment. In *O*, Decision No. 337 [2005], para. 68, the Tribunal found the PIP extension to be invalid, and consequently ordered the Bank to withdraw the 2002 memorandum relating to it from the Applicant's personnel records.

4. On 16 March 2005, prior to the issuance of the judgment in *O*, the Applicant filed Statement of Appeal No. 1353 challenging a number of administrative decisions, notably: (1) a request dated 16 February 2005 for a fitness-for-duty assessment; (2) a PIP dated 17 February 2005; (3) her 2004 Overall Performance Evaluation (OPE); and (4) her exclusion from a short list for a position on 12 March 2005.

5. On 15 September 2005, the Applicant filed another Statement of Appeal (No. 1374), challenging her salary increase and 2005 OPE as retaliatory.

6. The MOU was signed on 26 January 2006 with the stated objective of settling all unresolved and pending actions, including Appeals No. 1353 and 1374.

7. The MOU provided in relevant parts as follows:

> This Memorandum of Understanding (MOU or agreement) resolves all claims [the Applicant] has against the World Bank Group ….
>
> By signing this agreement, [the Applicant] … agrees to withdraw with prejudice … all unresolved and pending actions, including Appeals No. 1353 and 1374 and any other pending administrative reviews.
>
> The World Bank Group and [the Applicant] agree as follows:
>
> …

> [The Applicant] will remain in regular work and pay status for 18 months through July 31, 2007 … [and] endeavor to find an assignment in a unit outside of the Legal Vice Presidency ("LEGVPU") ….
>
> … [Her] work program will be supervised and approved by her manager in the Advisory Practice Group [to which she was assigned in LEGVPU]. …
>
> If [the Applicant] is unable to find a position of indefinite duration outside of LEGVPU … her appointment with the World Bank will terminate on July 31, 2007.
>
> [The Applicant's] 2004 and 2005 overall performance evaluations ("OPEs") and the performance improvement plan ("PIP") dated February 17, 2005 will be placed in the limited access section of her career file within 14 calendar days of execution of this agreement. The PIP dated February 17, 2005 and the PIP dated November 16, 2000 will not be considered in any future OPEs or personnel actions, but may be used by the Bank to defend any complaints, grievances or allegations made by [the Applicant] should she initiate any after execution of this agreement.
>
> …
>
> In addition, the parties agree to the following terms:
>
> …
>
> The parties authorize the World Bank to disclose the terms of this agreement *only* to those World Bank officials who may need to review, approve and/or execute the terms of this settlement agreement. Otherwise, the terms of this agreement shall remain confidential.
>
> In accepting these terms and conditions, [the Applicant] fully and finally settles and releases all claims she has against the Bank Group arising out of circumstances occurring or decisions taken on or before the date of her acceptance of this MOU. Settlement of her claims includes relinquishing of the right to appeal to the Appeals Committee, the Disability Administrative Review Panel, the Workers' Compensation Administrative Review Panel and the World Bank Administrative Tribunal. (Emphasis in original.)

8. Following the signing of the MOU, and prior to the insertion of the Applicant's 2004 and 2005 OPEs into the limited-access section of her personnel file, a Management Review Group reviewed the OPEs for final signature. The Applicant's 2004 and 2005 OPEs had been signed by the Applicant and her immediate supervisor before the MOU went into effect. At that time, no reviewing manager had signed either OPE. The Management Review Group consisted of a Human Resources Manager and three Deputy General Counsels, including the Applicant's new manager. The 2004 and 2005 OPEs were signed by two reviewing managers on 31 January 2006 and 3 February 2006, respectively.

9. On 5 June 2006, the Applicant filed Statement of Appeal No. 1393, challenging the confirmation on 3 February 2006 of the "retaliatory" 2004 and 2005 OPEs. The Bank submitted a jurisdictional challenge to the Appeal on 21 June 2006, on the basis that the matters of the 2004 and 2005 OPEs had been resolved with the signing of the MOU. The Bank further argued that the confirmation of the OPEs did not constitute an administrative decision subject to challenge before the Appeals Committee. The Applicant explained that the basis of her Appeal was the fact that her new manager and the Acting Vice President and General Counsel were made privy to the OPEs which were supposed to be "placed under seal pursuant to the terms of the MOU." In addition, she argued, the reviewing manager included a comment above his signature which constituted an administrative decision taken after the signing of the MOU, and which therefore she was not precluded from challenging. As relief, the Applicant asked for an acknowledgement that the 2004 and 2005 OPEs were erroneous.

10. On 11 October 2006, the Appeals Committee dismissed Appeal No. 1393 for lack of jurisdiction, finding, *inter alia*, that the confirmation of the OPEs did not constitute an administrative decision, and that the claims relating to the contents of the 2004 and 2005 OPEs were time-barred and had in any event been resolved under the MOU.

11. In the meanwhile, on 22 September 2006 the Applicant filed Statement of Appeal No. 1405, challenging her Salary Review Increase (SRI) Rating and salary increase as retaliatory, and complaining that she was not short-listed when she applied for an open position outside of LEGVPU. She also alleged that the Bank interfered with several of her current and potential work projects. She sought "[r]esults that eliminate the effect of retaliation."

12. On 24 May 2007, the Applicant filed yet another Statement of Appeal (No. 1426), challenging several actions by her supervisors, including not being short-listed for a position in March 2007, a retaliatory e-mail from her supervisor, and the reassignment of some of her projects.

13. As the Applicant did not secure permanent employment outside LEGVPU, her employment was terminated pursuant to the MOU on 31 July 2007.

14. As of the date of this judgment Appeals Nos. 1405 and 1426 are still pending.

15. The application to the Tribunal of present relevance, arising from the Applicant's unsuccessful Appeal No. 1393, alleges that: (1) the Bank breached the MOU by allowing the Management Review Group to review her 2004 and 2005 OPEs after the signing of the MOU and prior to putting them in the limited-access section of her personnel files; (2) disclosure of the OPEs to the Management Review Group was retaliatory; (3) the MOU was invalid because it was a contract of adhesion that was not entered in good faith; (4) the Bank interfered with her existing projects and thus prevented new projects from proceeding; and (5) the Bank breached the MOU when it failed to place her on a short list for positions she applied for and for which she was qualified.

16. The Bank argues that the Applicant's claims before the Tribunal should be dismissed for lack of jurisdiction, because the Applicant failed to exhaust internal remedies available within the Bank. Her first and second claims are doubly deficient, so the Bank says, because they do not assert a breach of any terms or conditions of employment.

Considerations

17. Article II(2) of the Tribunal's Statute requires that applicants must (save agreement to the contrary) first exhaust "all other remedies available within the Bank Group." In this case, the jurisdictional debate therefore comes down to assessing whether the Applicant properly brought her grievance to the Appeals Committee.

18. Applicants before the Tribunal should specify, pursuant to Article XII(1) of the Statute and Rule 7 of the Tribunal Rules, either or both of the following: (i) any decision to be rescinded; or (ii) any obligation to be specifically performed.

19. The Applicant has put her case as follows, with respect to decisions to be rescinded:

> The decisions contested are stated as follows:
>
> a. Including Applicant's new supervisor in a management meeting to consider her 2005 OPE although the OPE had restricted access.
>
> b. Insistence upon the continued validity of an MOU that was abrogated from inception and not implemented in good faith.

20. As for identifying the obligations to be specifically invoked, the application is unhelpful, saying only this:

> Violation of the Principles of Staff Employment, the "Contract" of Employment, and Staff Rule 8.01, Section 3.02 prohibiting retaliation.

21. To suggest that the Bank should be ordered specifically to perform "the Principles of Staff Employment" is, in the absence of any factual particulars, so general as to be meaningless. Nor can one readily understand how

a prohibition on retaliation could be specifically performed in the abstract. Moreover, this pleading makes it difficult to assess whether there has in fact been an exhaustion of internal remedies; the question is not whether an applicant has sought redress on account of unspecified violations of the Principles of Staff Employment or from unspecified retaliation, but whether the particular claims being made have already been considered by the Appeals Committee.

22. The Tribunal is only partially assisted by the lengthy "brief" attached to the application. Under "relief requested," it lists the following (apart from compensation for damages and costs):

a. Applicant requests that the Tribunal review Respondent's administrative decision of February 3, 2006 confirming Applicant's 2005 OPE, which was in reprisal for Applicant's reporting internal control lapses to the Audit Committee of the Board of Executive Directors in that year;

b. Applicant requests the Tribunal to determine that the MOU was abrogated.

23. Reading her pleading with indulgence, the Tribunal understands the claims presented by the Applicant broadly as the following:

(i) the participation of the Applicant's new supervisor "in a management meeting to consider her 2005 OPE although the OPE had restricted access" was a breach of the MOU;

(ii) the MOU was "abrogated from inception";

(iii) the MOU was "not implemented in good faith"; and

(iv) the Applicant suffered retaliation for whistle-blowing, specifically in the form of confirmation of the Applicant's 2005 OPE on 3 February 2006.

24. The jurisdictional issues are whether these claims are admissible before the Tribunal as having already been presented to the Appeals Committee.

25. Taking these claims in order, the Tribunal determines as follows.

26. The Applicant's Statement of Appeal No. 1393 attached a copy of an e-mail entitled "breach of the spirit of the MOU." The Bank's response raised the MOU as a bar to the Applicant's challenge of the relevant OPEs. In paragraph 1 of its decision in Appeal No. 1393, the Appeals Committee wrote that the Applicant "also alleges that the Bank's actions breached a Memorandum of Understanding she entered with the Respondent on January 26, 2006." The decision also refers to complaints by the Applicant to the effect that the OPEs had not been "placed under seal pursuant to the terms of the MOU." The Tribunal therefore concludes that the Applicant has exhausted internal remedies in respect of the claim described under Paragraph 23(i) above.

27. It follows that the claim described under Paragraph 23(iii), to the effect that the MOU was "not implemented in good faith," is also admissible, but only to the extent that the Applicant shows, at the merits stage, that the particular instances of claimed breach were articulated before the Appeals Committee.

28. The Bank insists that the Applicant has in any event not made allegations which, if proven, would amount to a breach of terms or conditions of employment. The function of the Tribunal, pursuant to Article II(1) of its Statute, is to rule on allegations of non-observance of staff members' contracts or terms of appointment. There is therefore, in the Bank's view, an independent bar to jurisdiction. The Tribunal notes that the Bank contends that the claim of breach of the MOU in relation to the processing of her 2005 OPE is frivolous, but that is a different matter. Unfounded it may be, but an allegation of breach of the MOU undoubtedly concerns a term of employment. The same is true with respect to a failure of "good-faith implementation" of the MOU. In this respect, the Bank fails to make the distinction between a jurisdictional objection and a motion to dismiss for failure to state a cause of action.

29. As to the claim under Paragraph 23(ii), to the effect that the MOU was "abrogated from inception," with the

greatest indulgence the Tribunal cannot see how this contention, which it understands as a claim of voidness *ab initio*, may be said to have been articulated before the Appeals Committee. It may in some form be a part of an element of a request for a remedy which remains available in Appeal No. 1405, but if so it remains pending and therefore has not been subjected to the exhaustion of internal remedies.

30. With respect to the claim described under Paragraph 23(iv), understood as an alleged violation of the Staff Rules rather than an alleged breach of the MOU, the Tribunal can see no trace of its having been presented to and dealt with by the Appeals Committee subsequently to the MOU. As to appeals lodged before the date of the MOU, they were putatively settled by that document. As long as the MOU stands, prior claims may not be revived. To the extent that she advances the proposition that "the breach of the MOU was founded in retaliation," it presumes a breach which remains to be established. As to other alleged incidents of post-MOU retaliation, the Applicant simply has not shown exhaustion of internal remedies which may or may not remain available.

31. The Bank's assertion that the Applicant's claims are frivolous remains to be evaluated. The outcome in this judgment on jurisdiction does not suggest that the Applicant is entitled to any costs; that question may be revisited in light of the final disposition of her grievance.

Decision

For these reasons, the Tribunal concludes as follows:

(i) it has jurisdiction over the Applicant's claims that:

(a) the participation of the Applicant's new supervisor "in a management meeting to consider her 2005 OPE although the OPE had restricted access" was a breach of the MOU, and

(b) the MOU was "not implemented in good faith," provided that the Applicant shows, at the merits stage, that the particular instances of this alleged breach were articulated before the Appeals Committee;

(ii) the dates for the filing of further pleadings on the merits with respect to the above issues will be determined by the President of the Tribunal and communicated to the parties.

(iii) all other claims are dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Zakir Hafez
Zakir Hafez
Counsel

At Washington, DC, 14 December 2007